In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2024: No. 49

BETWEEN:

P

Applicant

-v-

P

Respondent

RULING

Hearing: **29th and 30th April 2025**
Draft Circulated: **8th May 2025**
Final Ruling: **15th May 2025**

Appearances: **Changez Khan & Alma Dismont of Marshall, Diel & Myers for the Applicant**
Adam Richards of Richards Ltd. for the Respondent
Keith Robinson and Matthew Rhodes of Carey Olsen Ltd. for [redacted].

Application to avoid a transaction intended to prevent or reduce financial relief (section 41 of the Matrimonial Causes Act 1974) etc.

RULING of Richards J:

Introduction

1. The Applicant Wife and Respondent Husband were married on 16th June 2012. A Conditional Order for Divorce was made on 30th August 2024. Although the Wife asserts in the Affidavit filed in support of this application, dated 21st April 2025, that the Divorce

is yet to be made final, there is present within the Court file a Certificate doing just that, dated 1st April 2025. If the parties have not received copies of the same, they should indicate as much. Both parties have made applications for Ancillary Relief, which are yet to be determined. The Acting Registrar awarded the Applicant interim maintenance on 21st March 2025.

2. I have before me a Summons seeking the following:

> "(i) That the time for service of the Summons be abridged [which it effectively has been].
>
> (ii) That the Trustees, [redacted], be joined as necessary to these proceedings.
>
> (iii) That further orders be made as this honourable court deems reasonable adjust (sic) so as to prevent [redacted] in any way from altering, varying or restructuring the [redacted] Trust and disposing of, transferring, encumbering, or otherwise dealing with the assets of the [redacted] Trust, namely the [redacted] Hotel, pending the final determination of these Ancillary Relief proceedings or further order of the Court.
>
> (iv) The costs of this application be awarded to the Applicant on an indemnity basis."

3. The Summons was filed on 21st April 2025, seeking an urgent hearing and listed as swiftly as the Court and Counsel's availability would allow, on 29th and 30th April 2025. I received written and oral submissions from Mr Changez Khan on behalf of the Applicant and Mr Adam Richards on behalf of the Respondent. Mr Keith Robinson also made oral submissions on behalf of the [redacted] ("**The Trust**

Company"). Naturally enough, the arguments before me focused on paragraphs (ii) and (iii) above. The Respondent and the Trust Company resisted them both.

4. Before turning to the relevant law, the arguments and my analysis, it is necessary to set out some relevant factual background.

Factual Background

5. On 17th October 2022, the Applicant and Respondent jointly settled a discretionary trust ("**the N Trust**"). The Trust Company was appointed as and remains the sole Trustee. The Respondent was appointed as and remains the sole Protector of the Trust (with the power effectively to remove the Trustee). The beneficiaries were and remain: the Applicant, the Respondent and the Trust Company in its capacity as Trustee of another trust ("**the M Trust**"). The M Trust was settled by Mr H, who is also its beneficiary. He is further the Managing Director of the Trust Company, which is the Trustee of the M Trust.

6. The N Trust was created in order to acquire a business known as [redacted] ('**the Hotel**'). The Hotel (the premises and the business) is actually owned by a company, which purchased it in December 2023 (completion did not occur until May 2024). 100% of the shares in that company are owned by the N Trust.

7. The purchase of the Hotel was financed as follows:

   (i) A loan of $1,000,000 from the M Trust (pursuant to a Promissory Note and giving the M Trust no equitable interest in the property held by the N Trust);

   (ii) A loan of $1,000,000 from the Respondent's father (which the Applicant asserts a belief was actually generated by the Respondent during the marriage and held beneficially for him by his father);

   (iii) A loan of $2,370,000 from the Bank of N.T. Butterfield & Son, secured by way of mortgage and personal guarantees.

   (iv) $500,000 from the joint personal savings of the Applicant and the Respondent.

8. It appears common ground that the Hotel will have to be sold and that, in due course, the proceeds of such a sale (once the loans or at least some of them have been repaid) will form part of the matrimonial assets that the Court will have to divide (unless agreement can be reached). What is not agreed is when and how the Hotel should be placed on the market, with a view to its sale.

9. When the Hotel was last marketed it was at $5,000,000 and the offer accepted was $4,675,000. According to material before me, it was previously sold in 2015 for $4,500,000.

10. Within her application for Ancillary Relief (dated 28th November 2024), the Applicant sought a business valuation in relation to the Hotel. The Application for Ancillary Relief was in due course supplied to the Trust Company. On 4th March 2025 Mr H responded in the following terms:

> "Please be advised that we are agreeable to a valuation being undertaken on [the Hotel] and have no plans to sell this trust asset until matters are agreed between [the Respondent] and [the Applicant]."

11. Directions were given and there was to be a hearing in that regard on 25th March 2025. The day prior, the Respondent's Counsel wrote to the Court seeking the delisting of that hearing, stating that: *"The parties have made significant progress in agreeing the way forward on these issues."* Ultimately, however, the parties were not able to come to agreement on the terms of the instruction of an expert to value the business, although a suitable expert was identified.

12. By letter dated 21st April 2025, Mr H wrote to the Applicant's Counsel:

> "Given the poor financial performance of [the Hotel], we think it advisable to put [the Hotel] back on the market at $5,000,000 and see what offers we receive. Given that we paid $4,675,000 for the Hotel, we consider this a

reasonable starting point. Of course, we would circulate all offers received to all beneficiaries of the trust for comment before any offer is accepted."

13. The present application has been filed in response to that change of position by the Trust Company (which the Respondent supports).

The Law

14. Mr Khan has sought to persuade me to intervene to prevent the Hotel from being marketed and sold; something he says I can do either in the exercise of the specific statutory jurisdiction conferred by section 41 of the Matrimonial Causes Act 1974 ("**MCA**") or under section 19(c) of the Supreme Court Act 1905 ("**SCA**") or (if it be distinct from the latter[1]) by reason of this Court's inherent jurisdiction. Although Mr Richards and Mr Robinson seemed a little reluctant to concede as much, I do not doubt that, one way or another, the Court has the power to grant relief that would achieve what the Applicant seeks. To my mind, the question is really whether it is appropriate to do so in these circumstances; whether the applicable legislative and/or common law conditions are satisfied.

15. Section 41 of the MCA provides as follows:

> **41 Avoidance of transactions intended to prevent or reduce financial relief**
>
> (1) For the purposes of this section "financial relief" means relief under any of the provisions of sections 26, 27, 28, 31, 35 (except subsection (6)) and 39, and any reference in this section to defeating a person's claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions.

[1] Which I rather doubt – see paras. 14 – 19 of *UL v BK* [2013] EWHC 1735

(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—

(a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial relief in question.

(3) Where the court makes an order under subsection (2)(b) or (c) setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention

on the part of the other party to defeat the applicant's claim for financial relief.

(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

(a) in a case falling within subsection (2)(a) or (b), that the disposition or other dealing would (apart from this section) have the consequence; or

(b) in a case falling within subsection (2)(c), that the disposition has had the consequence,

of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(6) In this section "disposition" does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

(7) This section does not apply to a disposition made before 1 January 1975."

16. The provision which is potentially engaged here is of course section 41(2)(a), although reference to the whole section and, in particular, subsections (1), (5)(a) and (6) is necessary properly to understand how it is intended to operate.

17. Section 41 is closely modelled on section 37 of the UK Matrimonial Proceedings Act 1973. Mr Khan referred me to the English Court of Appeal's decision in *Kemmis v Kemmis* [1988] WLR 1307. Dealing with a submission that section 37 does not apply where the

disposition is made by a mere nominee or bare trustee for *"the other party to the proceedings"* Purchas LJ said as follows:

> "In the present case the property was vested in the company as such a nominee or trustee for the husband. That gave him an absolute and uncontrolled power to procure the company to dispose of the property for such purpose and in such manner as he might direct. He did procure the company to create the mortgage. In these circumstances, and while it is true that the company is not the other party to the proceedings, I baulk at construing section 37(2)(b) as to allow and encourage its avoidance by the simple device of vesting assets in a mere nominee or bare trust. That was the approach of Wood J and I entirely agree with him. I think that the most satisfactory basis for a decision of this point may be to hold that section 37(2)(b) looks to the *effective* disposition, which, in the circumstances of this and similar cases, is made when the other party to the proceedings at one and the same time procures the nominee or trustee to make the *actual* disposition; and includes any assurance of property of any description, whether made by an instrument or otherwise. Alternatively, it could be said that "the other party to the proceedings" must include a mere nominee or bare trustee for that party."

18. In a third, more recent decision of the Civil Division of the English Court of Appeal, McGladdery v McGladdery (1999) (unreported), Thorpe LJ said that *"Section 37 only empowers the court to avoid dispositions by the party to financial proceedings, not dispositions to that party"*. Later he continued: *"...no order can be made under section 37 of the Matrimonial Causes Act in relation to a disposition made by a company which is not the alter ego..."*. Morritt LJ (with whom Thorpe LJ and Sir Oliver Popplewell agreed) said that: *"... a consideration of the terms of section 37, in particular subsection (4), shows the application to be misconceived. By that subsection only transfers by the other spouse are reviewable. The transfer of which complaint is made was effected by Rapid Gen which, as conceded, is not to be regarded as the alter ego of either spouse."*

19. In *Crittenden v Crittenden* [1990] 2 FLR 361, Dillon LJ said:

> "...it seems plain that any reference to property in section 37(2)(a) must be a reference to property which, as explained for instance in section 24A, is property in which either or both parties to the marriage has or had a beneficial interest, either in possession or reversion. It cannot mean any property generally, whoever it may belong to, because section 37 is concerned to supplement primary provisions in the earlier sections of the 1973 Act. Therefore, section 37 cannot itself attach to a mere dealing with the company's property".

20. Bermuda's Act does not appear to me to have an exact equivalent of section 24A of the UK Act, but Dillon LJ clearly reads it as consistent with the overall scheme of the Act and says this about it:

> "That wording can relate to the shares in the company, Somerton Marine Ltd, which are owned in their own right by Mr and Mrs Crittenden, but it cannot relate to the assets of Somerton Marine Ltd."

21. As regards the Court's inherent power to grant a freezing injunction, there are some well-known fundamental principles, conveniently set out by Subair Williams J in *S v L* [2019] SC (Bda) 70 Comm:

> "A *Mareva* injunction is an exercise of judicial discretion. The requirements for the exercise of that discretion in favour of making an order are as follows:
>
> (i) the Plaintiff has a good arguable case on a substantive claim over which the court has jurisdiction;
>
> (ii) the Defendant has assets within the jurisdiction;
>
> (iii) There is a real risk of dissipation or secretion of assets which would render the plaintiff's relief nugatory."

22. In *UL v BK* [2013] EWHC 1735 Mostyn J sitting in the Family Division of the English High Court said (at paragraph 19):

"In my judgment it is therefore a fallacy to suggest that under section 37 of the 1973 Act proof of intention is required whereas under section 37 of the 1981 Act it is not. Under both procedures an unjustified dealing with assets will likely supply *prima facie* proof of an intention to dissipate. And, of course, under section 37(5)(b) Matrimonial Causes Act 1973 the intention to defeat the Applicant's claim is presumed in the case of an immediately prospectant transaction. This would suggest that, if anything, it is in fact easier to obtain the injunction under section 37 Matrimonial Causes Act 1973 than under the 1981 counterpart because under the former all the Applicant has to show is that a transaction is about to happen which would have the effect, if not restrained, of defeating a claim, while under the former there has to be shown by her some unjustified dealing by the Respondent with assets giving rise to a risk of dissipation. But I do not believe that there is in fact any real difference between the two tests."

The Completing Arguments

23. The Applicant contends that, absent a proper business valuation of the Hotel, there is a risk that it will be sold for less than it is worth. This, she contends, will have the effect of reducing the sum to which she will, in due course be entitled, once the financial proceedings ancillary to the divorce are concluded. On her behalf, Mr Khan has pointed to a number of circumstances which he says support the contention that the Court should intervene here. Amongst these are the apparent *volte face* which the Trust Company (and the Respondent) have made. Until about a month before they indicated an intention to seek to sell the property, the parties were so close to agreeing the instruction of a valuer that they jointly asked for a related hearing to be delisted.

24. The Applicant and Respondent both assert that business valuations are not easy matters, differing from property valuations. Mr Khan therefore urges me to view with scepticism the existing valuations (only one of which is in writing) provided by Bermuda Valuers Appraisers (dated 1st February 2023) and a real estate agent. Mr Richards has referred me

to the observations of the English Court of Appeal in *Versteegh v Versteegh* [2018] EWCA Civ 1050 (per Lewison LJ):

> "The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam) Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even when valuers use the same method of valuation, they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snapshot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect."

25. I note also an example cited in the journal *Family Law*, proffered by the Applicant's Counsel. In *P v P* [2008] EWHC 2953 (Fam) a district judge apparently accepted a valuation of the parties' shareholding at £730,000. A few months later between 2,400,000 and £2,800,000 was offered for it.

26. Mr Khan complains that unaudited accounts for the Hotel have only recently been disclosed by the Respondent. These indicate that, in the 2024 financial year, the Hotel made $806,779.67 against expenses of $3,009,328.58; a loss of $2,202,548.91. In the previous year the loss was $123,108.69. The main expense in the 2024 financial year was an impairment loss of $2,297,571.71. A note on the Balance Sheet indicates that *"On May 12, 2024, [the Hotel] was purchased by [the N Trust]. The Trust carried out an evaluation of the property before acquisition and determined that the fixed assets to be overvalued. As such an impairment is required on the fixed assets."* Mr Khan characterises this as an inadequate explanation for such a significant adjustment in the value of the business' main

asset. Mr Richards counters by pointing out that since the accounts previously stated the value of the business to be almost $7,000,000, the impairment loss merely reduced that to approximately what was paid when the business was acquired. Although it appears uncontroversial that the accounts were only recently supplied, Mr Richards points out that the Respondent has been "transparent" with the Applicant since at least July 2024 that the Hotel has operated at a significant loss.

27. Mr Khan also highlights the positions of the Trust Company and its Managing Director, Mr H. The Trust Company is not only the Trustee of the N Trust, but the Trustee of the M Trust, itself a beneficiary of the N Trust. Further Mr H runs the Trust Company, but is also (personally) the beneficiary of the M Trust. The Trust Company (as the Trustee of the M Trust), lent itself (as the Trustee of the N Trust) $1,000,000 towards the purchase of the Hotel. Mr Khan also highlights that Mr H and the Respondent are known to each other and have undertaken business together, as confirmed by correspondence written on the latter's behalf.

28. Mr Khan says that it is not too difficult to see how a conflict of interest could arise in the context of the sale of the Hotel. Acting as Trustee of the N Trust, the Trust Company should seek to sell the Hotel for the best price it can, but acting as Trustee for the M Trust, the Trust Company simply wishes to see itself repaid its investment in the Hotel (plus interest). A quick sale at or even below $5,000,000 might accomplish the latter, but a better price might be obtainable with greater patience. It has been contended on the Applicant's behalf that the Trust Deed vests the Trustee with unusually broad powers. In this regard reference is made to clause 19 in particular. It is also noted that the Respondent is the sole Protector of the Trust, with the power to remove the Trustee.

29. Mr Robinson has responded to these arguments (on behalf of the Trust Company) by contending that the terms of the Trust are fairly standard for a Bermuda discretionary trust. He has taken me to the judgment of Lord Richards[2] in *Wong v Grand View* [2022] UKPC

[2] No relation to me, but since I am also unrelated to Mr Richards, for all I know, he and Lord Richards may be related!

47 (where a provision similar in wording to clause 19 is mentioned) in support of his proposition that it is essentially standard wording. He contends that, contrary to what has been asserted by or on behalf of the Applicant, the Trust Company remains bound by fiduciary duties toward all the beneficiaries of the N Trust as Trustee. Mr H has also asserted his understanding that the Trust Company has such obligations in his Affidavit dated 25th April 2025.

30. Mr Richards and Mr Robinson have highlighted that the Applicant was a joint settlor of the N Trust with the Respondent. This is said to be relevant in a number of ways. Undoubtedly there are reasons why this structure was thought to be a sensible and/or desirable one when the purchase of the Hotel was being considered. It is uncontroversial that the Trust was settled for that purpose, although some time before the purchase completed. However, it is argued that, having agreed to the establishment of the trust, the Applicant cannot now legitimately complain about the Trustee acting within the powers that she and the Respondent jointly conferred upon him. And, to the extent that it may now be said to be in a position of a conflict of interest, the Trust Company did not place itself in that position, but was placed there by the Settlors.

31. The Respondent defends his change of heart as to the sale of the Hotel by reference to the mounting costs. The Hotel is unprofitable. It does not generate sufficient revenue to service the debt obligations to the bank. A valuation of the kind the Applicant seeks would cost $30,000 to $50,000. Mr Khan counters that that is a small sum in the context of a multi-million dollar asset. Mr Richards rejoins that the equity in the Hotel is substantially less than that. The Trust Company also justifies its change of attitude toward sale, by reference to the financial position of the business as evidenced in the recently supplied accounts.

32. The Trust Company has offered to undertake not to enter a contract for sale of the Hotel without affording the Applicant and Respondent 14 days' notice. It has also said that it is content to preserve the equity realised by the sale of the Hotel until it may be distributed as the Court determines on conclusion of the Ancillary Relief proceedings. Mr Khan says this misses the point. He fears that the Court may in due course conclude that the Hotel

should be marketed for $7,000,000 and that any purchaser who has offered $5,000,000 in the interim may back out when the price goes up. *"From the Wife 's point of view, she faces a* fait accompli *pressures to agree to sale at an undervalue. The irony is that, if the business had been marketed correctly at the outset, the buyer may well have been willing to pay more."*

Analysis & Decision

33. In my judgment it would be wrong to join the Trust Company to these proceedings simply in an effort to bring them within the scope of section 41. I do not understand section 41 to work like that. To my mind its language is clearly apt to apply as between the standard parties to a divorce proceeding; spouses or former spouses. The case law I have cited above certainly recognises that a company's assets may be treated as those of a spouse when it may properly be said to be his or her *alter ego*. Further, a nominee or bare trustee who disposes of funds on behalf of a spouse may be considered to fall within the meaning of *"the other party to the proceedings"*, but the Trust Company is not in such a position. Indeed the Applicant's own contentions as to the breadth of the Trust Company's powers as Trustee show that it is very far from being a bare trustee. Although I can understand why the Applicant harbours concerns as to the objectivity of the Trust Company, given Mr H's connection with the Respondent and coincident timing of their changes of mind as regards the marketing of the business, I do not consider this evidence to be sufficient to characterise the Trust as the Respondent's *alter ego* (and in fairness, that has not been done).

34. I do not, therefore, think that section 41 is apt to achieve the Applicant's purpose, but even if I am wrong about that, there seems to me to be another impediment to me granting the relief sought, whether under the MCA, the SCA or the Court's inherent jurisdiction. Under the former I would need to be satisfied that the disposition or other dealing about to be made was made with the intention of defeating the Applicant's claim for financial relief. That intention shall be presumed (unless the contrary is shown), if I am satisfied that the disposition or other dealing would have the consequence of defeating the Applicant's claim (subsection (5)(a)). Preventing (or reducing the amount of) any financial relief which might

be granted to a person is to be regarded as defeating their claim for such relief (subsection (1)).

35. This language seems to me to overlap significantly with the precondition of a real risk of dissipation in the *Mareva* context. Popplewell J (as he then was) in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 said (as subsequently approved by Haddon-Cave LJ in *Lakatamia Shipping Company Limited v Mortimoto* [2019] EWCA Civ 2203 and Males LJ in *Crowther v Crowther* [2020] EWCA Civ 762):

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets.... In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
>
> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
>
> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) In is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated...
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of its business in a way which will have the effect of making it judgment proof...

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

36. When judged against these exacting criteria, I think the weakness of the present application is revealed. No dishonesty is of course or could properly be asserted. Before we reach that point, however, I see very little "solid evidence" that the Hotel is worth more than $5,000,000. It might be, but the only indication of that possibility is that the accounts previously valued it at something approaching $7,000,000. Against that, in the last decade, it appears to have sold twice for less than $5,000,000 and the last such sale was only a year ago. That figure is supported by two valuations which undoubtedly have their limitations, but so would the valuation that the Applicant seeks. The case law makes it clear that business valuations are notoriously difficult. I accept that the "acid test" is exposure to the market.

37. I cannot know what an expert valuer would say, but on the evidence before me, I do not think it is likely that she or he would conclude that the Hotel is worth significantly more than what the Trustee proposes to market it at. Furthermore, even if they did, it is the market that would ultimately determine whether such a valuation was realistic.

38. That which is asserted to amount to a risk of dissipation in this case is in my judgment too remote to meet the "real risk" threshold. It depends not only upon the Hotel actually being worth more than most of the evidence suggests it is, but on the market failing to recognise that fact. And notwithstanding the suggestion Mr Khan has made about the Trust Company (as Trustee of the M Trust) having an interest in seeking a quick sale at a low price so that

it may repay itself its loan, it seems to me that the Trust Company would be unlikely to act in such a manner. First (as its Managing Director has accepted in a sworn Affidavit), it owes the Applicant and Respondent fiduciary duties as a Trustee of the N Trust and, should it act in breach of those duties the Applicant may have remedies against it (as Mr Robinson has pointed out). Secondly, the M Trust is itself a beneficiary of the N Trust (alongside the Applicant and Respondent). The Trust Company does not therefore seem to me to have a good reason to seek to market the Hotel at an undervalue. Thirdly, if the Trustee were to seek to accept a low offer after only a short period of time, I can see how the Applicant might then be able to assert that a real risk of dissipation has solidified and thus have a basis for seeking the Court's intervention at that stage.

39. Mr Khan suggested in his reply that, if the Hotel is in fact worth $7,000,000 (and could be sold at that amount) that would equate to $1,000,000 more each for the Applicant and the Respondent. I was initially attracted by that submission, but on reflection I do not think I should allow myself to be deflected from the requisite test, in which value does not appear to play a role. A fanciful risk of a very large "dissipation" must not be mistaken for a *real* risk of dissipation (of whatever size). With the greatest of respect to Mr Khan, the risk he hypothesises is a fanciful one, in my judgment.

40. I do not entirely dismiss Mr Khan's concerns about the undesirability of marketing the business now at $5,000,000, only to put the price up if a valuation is subsequently obtained which suggests that it should be increased. However, I must assess the likelihood of that occurring and, on the evidence before me, I deem it to be low. Further, it cannot alter the well-established principle that I can only act if I am satisfied of a real risk of dissipation, which I am not.

41. Since that is my view, I cannot conclude either that the action the Trustee proposes to take would have the consequence of reducing the amount of any financial relief which might be granted to the Applicant (as would be required to invoke section 41). It seems to me than a "would have" test may be higher than a "real risk" test (although I have not found that view expressed in the case law), but I am satisfied of neither.

42. In *Crowther v Crowther* [2020] EWCA Civ 762 at paragraphs 49 to 71 Males LJ set out circumstances that did justify the conclusion that a real risk of dissipation had been established. The present circumstances seem to me to fall far short of those.

43. Penultimately, I consider that the undertakings which the Trust Company offers are appropriate and I will accept them. They will enable the Applicant to object to any proposed sale before it takes place and to seek the Court's intervention if she wishes. They will also preserve any equity that may be realised from the sale of the Hotel pending the conclusion of the Ancillary Relief proceedings.

44. Lastly, having reached these conclusions, I am not satisfied that it is appropriate to join the Trust Company to these proceedings at this time.

Conclusion

45. I therefore refuse the applications that are made and I accept the undertakings made by the Trust Company. The Hotel may accordingly be marketed and sold, subject to any application(s) that may be made upon notice of such a sale being given. I should not be thought to be encouraging anyone to make such an application. Its prospects would likely depend very much on the circumstances of the proposed sale, but if those are such that the Applicant feels they give her proper cause for concern, the Court will hear her.

46. Given the recent history of the proceedings (or at least the correspondence incidental thereto), I have some sympathy for the Applicant. I can understand how, under the circumstances, she is inclined to view the actions of the Respondent and the Trust Company with a greater degree of suspicion than I have ultimately found to be warranted. I can see how their recent change of position about the business valuation may appear unfair to the Applicant, even though I do not believe I may properly intervene.

47. Although I am not particularly optimistic, I am confident that both parties to this divorce would ultimately be better served if they could once again manage to negotiate constructively and strive to agree matters to the greatest extent possible.

48. I am, for these reasons, not currently minded to award any party (or the Trust Company) costs on this application. That is a preliminary view, but one which may take some effort to displace. If anyone seeks to do so, they should file written submissions within 14 days.

Dated **15th** day of **May 2025**

THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE